

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

T.J. LEE ROSE,

Defendant-Appellant.

UNPUBLISHED

May 12, 2009

No. 284241

Lenawee Circuit Court

LC No. 06-012133-FH

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

A jury convicted defendant of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and the trial court imposed a prison sentence of 86 to 180 months, which was within the sentencing guidelines range as determined by the court. In a prior appeal, this Court determined that the sentencing guidelines were erroneously scored and, accordingly, remanded for resentencing. *People v Rose*, unpublished opinion per curiam of the Court of Appeals, issued October 23, 2007 (Docket No. 272276). On remand, the trial court determined that defendant should be sentenced as a second habitual offender, MCL 769.10, and rescored the guidelines in accordance with this Court's prior decision, resulting in an adjusted guidelines range of 12 to 30 months. The trial court elected to depart from that range and again sentenced defendant to a prison term of 86 to 180 months. Defendant appeals as of right and we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). The court may depart from the guidelines range if it "has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a) and (b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

"[T]he Legislature intended 'substantial and compelling reasons' to exist only in exceptional cases." *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). Only objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). Objective and verifiable factors are

“actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A departure is appropriate “if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines ranges is not proportionate to the seriousness of the defendant’s conduct and to the seriousness of his criminal history,” such that a departure would result in “a more proportionate criminal sentence than is available within the guidelines range.” *Babcock, supra* at 264.

Once the court has a valid basis for departing from the guidelines, the reasons cited by the court must justify the particular departure. *Id.* at 272-273; *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001); *People v Havens*, 268 Mich App 15, 17; 706 NW2d 210 (2005). In other words, the extent of the departure must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Babcock, supra* at 264.

On appeal, this Court reviews the trial court’s reasons for departure for clear error. The trial court’s determination that a particular factor is objective and verifiable is reviewed as a matter of law. Whether the reasons cited by the trial court are substantial and compelling to justify the departure is reviewed for an abuse of discretion, which occurs when the minimum sentence imposed falls outside the range of principled outcomes. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

At defendant’s original sentencing, the trial court scored offense variable (OV) 7 at 50 points in part because “the victim’s testimony indicated that she found the act to be humiliating.” This Court found that “there was nothing in the record to support a finding that the victim was subjected to extreme or prolonged humiliation.” *Rose, supra*, slip op at 2. At defendant’s resentencing, the trial court nonetheless elected to depart from the guidelines range due to the “extreme humiliation” suffered by the victim. At the re-sentencing hearing, the victim’s father stated that “[t]he humiliation my daughter suffers is daily,” and the victim’s mother stated that her daughter suffers from the crime and trial “every day” and will for “the rest of her life.” In light of this evidence, the trial court did not clearly err in finding that the victim suffered extreme humiliation as a result of the offense.

The trial court also elected to depart from the guidelines because it found by a preponderance of the evidence that defendant had committed a separate CSC offense even though he was acquitted of that charge. Contrary to defendant’s argument, that was not improper. The second offense was not taken into consideration by the guidelines. A court may consider offenses established by the evidence offered at trial even if the defendant was acquitted of those charges. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). That is because even where the jury “declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing.” *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993). Therefore, the trial court did not abuse its discretion in finding that the other offense provided a substantial and compelling reason for departure.

Finally, the trial court indicated that it was departing upwards from the guidelines in this case because of the egregiousness of the crime, finding that the guideline for a crime “against a child like this” was not proportionate to the crime. See, *Smith, supra* at 305, 310. In review of the sentencing transcript, we conclude the trial court did not abuse its discretion in finding that

the guidelines sentence was not proportionate to the crime, but that its sentence was. Specifically, the evidence showed that defendant held a position of trust when he committed the act against the 10-year old victim. The victim and her eight-year old sister were both subjected to similar acts, thus showing defendant's propensity to engage in the conduct again. And, the trial court also considered defendant's good prison record, but still concluded the longer sentence was proportionate to the crime.

Affirmed.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens